Mississippi Criminal Law Update

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***Clark v. State*, No. 2017-CT-00411-SCT, 2021 WL 401324 (Miss. Feb. 4, 2021)**
Motion for Rehearing pending
https://courts.ms.gov/Images/Opinions/CO152123.pdf

Issue: Expert Qualification SBS case

On certiorari review, the MSSC reinstated Clark's conviction for depraved-heart murder after the COA reversed it.

At Clark's trial the prosecution relied on the testimony of Dr. Karen Lakin who opined that the child victim's death resulted from Shaken Baby Syndrome (SBS)/ Abusive Head Trauma (AHT). The COA reversed, finding that Dr. Lakin's opinion testimony failed to meet the reliability prong of the *Daubert* standard and was improperly admitted. The COA also found that the trial judge did not make necessary *Daubert* findings and found Dr. Lakin unqualified due to her inability to recall certain publications and concessions she made during cross-examination.

The MSSC reversed the COA, ruling that an appellate court is not the gatekeeper under *Daubert*, the trial court is. The appellate court's function is to determine whether the actual gatekeeper, the trial judge, abused his discretion in performing that role. Here the trial court did not abuse its discretion in qualifying Dr. Lakin.

Mental Competency

***Robinson v. State*, 301 So. 3d 577 (Miss. 2020)**
https://courts.ms.gov/Images/Opinions/CO146884.pdf

Issue: Mental Competency - MRCrP 12.2(a).

On appeal Robinson contended that the trial court erred by denying her motion for a mental evaluation.

The MSSC found that, based on the trial judge's use of personal knowledge from past dealings with Robinson and current observation of Robinson, there was no abuse of discretion in denying the motion. Robinson's counsel claimed that

Robinson would not communicate effectively with her, but Robinson had no difficulty communicating on the record.

The Court emphasized that competency is the ability to rationally communicate with one's attorney about the case. Robinson's penchant for tangents, conspiracy theories, and "rabbit holes" were only cited for wasting the attorney's time and resources rather than inability to communicate. The record gives no indication Robinson was unable to assist in her defense.

Indictment Sufficiency

***Mitchell v. State*, No. 2019-KA-01768-COA, 2021 WL 1098603 (3/23/21)**
Motion for Rehearing Pending
https://courts.ms.gov/Images/Opinions/CO150278.pdf

Mitchell was convicted of attempted kidnapping and the issue was whether there was an overt act. The kidnapping was thwarted when Mitchell and his cohorts arrived at the intended crime scene and were arrested. The elaborate scheme and the putting in motion of the plan met the requirements of attempt.

The indictment did not describe the overt act of the attempt which rendered the indictment defective. However, the Court found harmless error: Based on the record the omission of the specific overt act conduct in the indictment was harmless and did not render the trial fundamentally unfair. Sufficient notice was provided through discovery and the preliminary hearing.

Sufficiency of Evidence

***Barton v. State*, 303 So. 3d 698 (Miss. 2020)**
https://courts.ms.gov/Images/Opinions/CO149215.pdf

Sufficiency of Evidence – possession of a stolen firearm

On cert review: conviction for possession of a stolen firearm. A stolen firearm was discovered by police in Barton's truck.

The rightful owner of the handgun testified the gun was stolen, but he did not know who had stolen it nor when it was stolen.

No evidence showed when the firearm was stolen. No evidence showed how Barton came to possess the handgun or that Barton possessed recently stolen property. The State argued that Barton knew the firearm was stolen because he attempted to conceal it from police. But Barton is a convicted felon so there was another reason for his trying to conceal the gun.

The court reversed the possession of stolen firearm conviction pointing out that in a possession of stolen property charge, "[t]he evidence … must establish beyond a reasonable doubt that the accused knew the property had been stolen, and mere supposition or suspicion as to his knowledge will not suffice." This is a different standard that in burglary cases.

***Hampton v. State*, 309 So. 3d 1055 (Miss. 2021)**
https://courts.ms.gov/Images/Opinions/CO149823.pdf

Issue: Sufficiency for child abuse

Hampton was convicted of two counts of felony child abuse for starving and burning her boyfriend's child. Social services found the child malnourished and with second degree burns on one leg. There was no question about the starvation charge.

The State's expert testified only that the child was medically neglected regarding the burn injury.

Medical neglect of a minor child is governed by a separate subsection of the applicable statutes which criminalizes intentional, knowing, or reckless deprivation of necessary "health care or supervision" of a child that "results in substantial harm to the child's physical, mental, or emotional health."

Felony child neglect is a different crime from felony child abuse. The State's evidence only provedthat Hampton knew or should have known that the child had been burned which was insufficient to prove the crime of felony child abuse which requires proof that Hampton knowingly or recklessly caused the burns.

***Dean v. State*, 295 So. 3d 575 (Miss. Ct. App. 2020)**
https://courts.ms.gov/Images/Opinions/CO144762.pdf

Issue: Sufficiency in Burglary case

Dean argued the evidence was insufficient to support a guilty verdict for burglary of a building because the State failed to prove beyond a reasonable doubt that a breaking occurred. The house in question was under construction. Surveillance cameras captured some of the crime but not the point of entry or condition of the doors. The homeowner testified being at the house before the incident but did not say whether the windows and doors were secured when he left. So, there was no evidence of the condition of the doors on the date of the incident and no evidence regarding the breaking element.

The Court found that the State did not prove the element of "breaking" beyond a reasonable doubt. Reversed and rendered.

***Moberg v. State*, 303 So. 3d 815 (Miss. Ct. App. 2020)**
https://courts.ms.gov/Images/Opinions/CO145018.pdf

Issue: Sufficiency for Kidnapping

Moberg was convicted of capital murder. The victim left his house with Moberg intending to help Moberg move into a trailer. The State's theory was that the kidnapping was committed by "inveigling" rather than force.

Inveigling has no component of force, but only of coaxing. One does not forcibly inveigle. Guilt exists if the defendant coaxes the victim with the intent to secretly confine. Here the intent to confine was proved by circumstantial evidence. Kidnapping is not a specific intent crime. No proof is needed that the defendant had the specific intent to kidnap at the time of the taking. It is sufficient that the circumstances establish that a kidnapping resulted from the defendant's actions and it is not necessary to prove intent by direct evidence.

Here Moberg got Jesse to leave his mother's house to help Moberg move into a new trailer. Moberg and Jesse never moved anything. Moberg convinced Jesse to travel further by telling him they were going to get drugs. Jesse did not help Moberg move, and they did not obtain drugs. GPS data, surveillance video, and

text messaging provided evidence to prove Moberg's location and the timeline of events leading up to Jesse's death.

The evidence was sufficient to prove kidnapping by inveigling.

***Brown v. State*, 304 So. 3d 692 (Miss. Ct. App. 2020)**
https://courts.ms.gov/Images/Opinions/CO148876.pdf

Issue sufficiency of culpable negligence for manslaughter

Brown a nightclub bouncer was convicted of culpable negligence manslaughter when Quincy, a rowdy overweight patron, resisted being removed and Brown had to get physical. Quincy had chronic heart disease and suffered cardiac arrest associated with stress in the altercation. The pathologist listed homicide as the manner of death. There was conflicting testimony about "choking" of the victim.

The COA ruled that Brown's action of removing Quiney from the club did not meet the high burden of culpable negligence. While Brown's actions may have been negligent, there was no evidence of severe trauma or trauma in multiple locations that could constitute gross negligence. The facts were insufficient to demonstrate "negligence so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life." Reversed and rendered.

***Robinson v. State*, No. 2019-KA-01081-COA, 2021 WL 98766 (1/12/21)**
Motion for Rehearing Pending
https://courts.ms.gov/Images/Opinions/CO151186.pdf

Issue: Sufficiency for Accessory After the Fact

Robinson, an off-duty police officer, was present when Hogan shot Banks in a gang related shooting. Robinson tossed Hogan his car keys and said, "go go go." Hogan left the scene in Robinson's car. Several witnesses testified that Robinson was a member of the Vice Lords gang and it was shown that Robinson had gang tattoos.

The COA found that Robinson showed signs of guilt by failing to disclose to police his whereabouts during the shooting and not telling police about his giving Hogan

his car keys. Robinson testified he gave his car keys to Hogan out of fear. He did not call the police and went to his parents' house.

The evidence was sufficient that Robinson intended to assist Hogan after the fact of a murder and that the felony involved was due to his association of the Vice Lords street gang. A flight instruction was also properly given under the facts of the case.

***Russell v. State*, No. 2019-KA-00763-COA, 2021 WL 344839 (2/2/21)**
Motion for Rehearing Pending
https://courts.ms.gov/Images/Opinions/CO150046.pdf

Issue: Sufficiency for Embezzlement

Russell convicted of embezzling from his employer KLLM.

KLLM used the services of Comdata to pay for repairs electronically across the country via Comchecks which were also used to forward cash to truckers on the road. Normally, when a repair was complete, the service provider was given a code to receive payment from Comdata who would then bill KLLM. Truckers requiring cash could "cash" a Comcheck at truck-stops by presenting a payment code.

Russell fabricated false repair orders and then used electronic payment codes to cash Comchecks at a truck-stop in Jackson. His argument was that the crime was not embezzlement because he was not entrusted with KLLM's money and the money he received was from Comdata or the truck stop.

The court said that Russell's scheme constituted sufficient proof of embezzlement.

***Rainey v. State*, No. 2019-KA-01651-COA, 2021 WL 973050 (MS COA 3/16/21)**
Motion for Rehearing Pending
https://courts.ms.gov/index.php?cn=91228#dispArea

Issue: Sufficiency in Witness Intimidation case.

Count I voter fraud: Rainey allegedly helped Emma Ousley and others register to vote and gave them money, and a ride to the polls. Rainey was indicted for voter fraud, but the jury hung on this count.

In Count II, Rainey was charged with witness intimidation for trying to influence the reporting of her conduct by those she allegedly "assisted" voting. Investigators obtained a statement from Ousley. After this, Rainey contacted Ousley and questioned her about what she told investigators specifically about the payments. Ousley testified, "[Rainey] didn't tell me to say anything [and] she didn't intimidate me. It was no kind of intimidation at all." Ousley told Rainey she was going to tell the truth. Nowhere in her testimony did Ousley say that Rainey told her to lie about the money Rainey had given her as the State argued.

Without direct testimony that Rainey told Ousley to give false statements or testimony, there was no proof of a key element of the crime charged and the jury's conviction of witness tampering by inducing a witness to give a false statement was unsupported. Reversed and rendered.

Double Jeopardy

***Harris v. State*, No. 2018-KA-01621-SCT, 2021 WL 1309755 (Miss. Apr. 8, 2021)**
https://courts.ms.gov/Images/Opinions/CO144839.pdf

Harris's theory of defense to the burglary charge was that there was no attempt to commit a criminal act because he was suffering from an epileptic seizure. Harris testified that he suffered a seizure causing him to slam into the door of a house. Harris's attorney advised that he was not pleading insanity. The State moved for a mistrial. The court granted the mistrial by equating epilepsy with insanity for which there was no notice of an insanity defense.

Finding: the mistrial in Harris's first trial was not manifestly necessary. In the absence of manifest necessity, the constitutional protection against double jeopardy prohibited a second trial for the same crime. Harris's double jeopardy rights were violated by his second trial and conviction. Harris's conviction was reversed and rendered.

Constructive Possession

***Terry v. State*, No. 2019-CT-00623-SCT, 2021 WL 218999 (Miss. Jan. 21, 2021)**
https://courts.ms.gov/Images/Opinions/CO149843.pdf

Issue: Constructive possession

Officers serving a warrant saw drugs in plain view and Terry with a child. There was conflicting evidence of whether Terry lived at the residence. As for sufficiency, the jury heard evidence that Terry lived in the apartment.

Ruling: At the time the search warrant was executed, Terry was exerting control over the premises. Because the drugs were in plain view, Terry knew or should have known of the presence of the substance. There was evidence of "other circumstances" in a case of non-exclusive occupation of premises. The evidence was sufficient for conviction.

***Smoots v. State*, 310 So. 3d 1184 (Miss. Ct. App. 2020)**
https://courts.ms.gov/Images/Opinions/CO146891.pdf

Smoots ran a pool hall. The day before Smoots' arrest police conducted a controlled drug buy. The next day warrant they secured a search warrant. When the search warrant was executed, there were three men in pool hall at the time one of whom was Smoots. When police entered, they heard a commode running. They looked in sewer line and found cocaine. Smoots had a $20 bill from the controlled buy. Smoots was convicted of possession with intent. Reversed – insufficient proof of constructive possession. Smoots was not in exclusive control of the premises.

***Williams v. State*, No. 2019-KA-01007-COA, 2020 WL 7350420 (12/15/20)**
Motion for Rehearing – denied 4/20/21

https://courts.ms.gov/Images/Opinions/CO149707.pdf

Possession with intent – drugs found at William's residence. He was incarcerated at the time. Evidence showed Williams communicated with another man using

coded drug parlance instructing the other person to handle Williams' feigned "appliance business" – the evidence sufficient for constructive possession.

Hearsay

***Thames v. State*, 299 So. 3d 927 (Miss. Ct. App. 2020)**
https://courts.ms.gov/Images/Opinions/CO147015.pdf

Issue: Hearsay

Thames managed a store and was accused of working with another man who came in and arm robbed the store – questions arose about Thames' training and whether he deviated from that. Thames wanted to testify about what he was told in his training, but the trial court sustained the state's objection to hearsay.

Harmless error – The information defense counsel sought to elicit was established by the testimony of other witnesses or Thames himself. Thames's defense was not prejudiced.

We agree that Thames's prospective testimony about his training and instruction did not constitute hearsay and should have been allowed; however, we find no prejudice resulted from this ruling. Testimony about information a witness receives is not hearsay if it is offered to explain a subsequent course of action of the witness based on that information. Here, the out-of-court statements were not offered to prove the truth of Thames's assertions but rather to show "information acted on."

***Montson v. State*, No. 2019-KA-00030-COA, 2020 WL 6281190 (10/27/20)**
Cert. Petition Pending
https://courts.ms.gov/Images/Opinions/CO148884.pdf

Issue: Hearsay - Police arrested Montson for the murder of his wife. He claimed that he shot Linda in self-defense after she drew a gun and aimed it at him.

Linda had previously filed an affidavit against Montson to prosecute him for domestic violence. The affidavit said, "Bobby said if I leave him that he will blow

my brain out." The trial court found, over objection, that the affidavit was admissible to explain the course of the investigation.

The State was also allowed to elicit testimony from a detective about the content of statements he received from Linda's three sons in which each basically said they awoke to a screaming followed by several gunshots and that each observed Montson walking away calmly from the apartment with a gun in his hand. There was some limitation by the trial court that the detective could not repeat the statements word-for-word but would be permitted only to disclose those portions of the statements reasonably necessary to aid the jury in understanding the steps of the detective's investigation.

The Court ruled that Linda's affidavit was testimonial hearsay relevant to a later prosecution. Montson was never able to cross-examine Linda concerning these testimonial statements. The doctrine of "forfeiture by wrongdoing" did not apply. Affidavits like Linda's are precisely the type of testimonial hearsay that the Confrontation Clause was designed to exclude.

Also, the detective's testimony was hearsay. The son's statements went beyond an explanation of the course of his investigation and directly to the truth of the matter asserted—that Montson killed Linda with deliberate design rather than in self-defense. If an officer testifies about "how he received a complaint, and what he did about the complaint," he should do so "without going into details of it."

***Buchanan (and Jones) v. State*, No. 2017-CT-01082-SCT, 2021 WL 1310276 (Miss. 4/8/21)** https://courts.ms.gov/Images/Opinions/CO151110.pdf

Co-defendant, Keys, gave a recorded statement. After indictment, Keys was murdered. Some of the other co-defendants were suspects. At the time of Keys' death, Jones was incarcerated. The trial court denied a motion to exclude Keys' statement under MRE 804(b)(3) (statement-against-interest hearsay exception), 804(b)(5) (catch-all hearsay exception), and 804(b)(6) (forfeiture-by-wrongdoing hearsay exception).

Finding: the record had sufficient evidence (preponderance) to show that Jones conspired to commit the original murders and that Keys' murder was in furtherance and within the scope of that conspiracy and reasonably foreseeable to Jones. Thus, the action of those who killed Keys can be imputed to Jones, thereby waiving Jones's Confrontation Clause rights. The record showed that Jones "ha[d] in mind the particular purpose of making [Keys] unavailable." The men remained in contact even though Jones was incarcerated. After Jones learned that Keys gave the statement, Keys was killed, and two of Jones's codefendants, Holland and Buchanan, were involved in Keys' death.

(There is more to this case than just the hearsay issue.)

***Stevens v. State*, No. 2020-KA-00102-COA, 2021 WL 868655 (3/9/21)**
https://courts.ms.gov/Images%5COpinions%5CCO152474.pdf

A concrete saw was stolen from a construction site. A witness wrote down the tag number of a suspicious car at the site around the time of the theft. Investigators used a website called "LeadsOnline" - an online database of pawnshop transactions which showed that Stevens pawned a concrete saw several weeks after the theft. The trial court found that this evidence was not hearsay because it was not offered for the truth of the matter asserted and explained the officer's actions in questioning Stevens.

However, the Court found that the trial judge abused his discretion by admitting the "LeadsOnline Ticket" documenting the transaction into evidence. By the time the document was offered into evidence the investigator had already explained why his investigation focused on Stevens and there was no need to offer further documentary evidence of the pawnshop transaction. The only purpose for admitting the ticket was to show that Stevens had, in fact, pawned the concrete saw—*i.e.*, to prove the truth of the matter asserted. Accordingly, the document was hearsay and should not have been admitted. The error was harmless and does not require reversal. The better practice in this case would have been to obtain evidence of the pawnshop transaction that could have been admitted to prove the truth of the matter asserted.

Confessions

***Dean v. State*, 305 So. 3d 1200 (Miss. Ct. App. 2020)**
https://courts.ms.gov/Images/Opinions/CO143895.pdf

Issue: Suppression of statement – Murder case – prior to his preliminary hearing, Dean asked to speak to investigators about what happened. Dean was Mirandized and signed a waiver. Without any interrogation, Dean said he wanted to write a statement. Inv. Arendale gave him a statement form and left the room. Later, Arendale went back in the room. Dean had changed his mind and no longer wanted to give a statement.

As they were leaving the interview room, Arendale saw Dean flip a balled-up piece of paper into a trash can. Arendale later retrieved the paper from the garbage. Dean had scratched through his writing and had ripped the paper into pieces. Arendale sent the paper to the crime lab, and the examiner was able to determine the paper's content - an admission to shooting the victim.

The COA found that the admission of Dean's confession did not violate his Miranda rights as he was not subject to custodial interrogation when he gave his confession. Without interrogation, Arendale merely provided Dean with the requested materials to write his statement and left the room.

No error in admitting Dean's discarded written statement.

Hamer v. State, No. 2019-KA-01051-COA, 2020 WL 7350424 (12/15/20)
Cert. Petition Pending
https://courts.ms.gov/Images/Opinions/CO151509.pdf

Issue: Voluntariness of confession – promises of inducement

Double homicide / home invasion – two investigators promised to help Hamer if he confessed. The investigators also told Hamer they had evidence implicated him – some of it true, some not.

The COA ruled Hamer's confession of involvement not involuntarily induced by the promises finding that the cause of the confession was the "disclosure" of

evidence during the interview rather than the promises made by the investigators.

***Jones v. State,* 303 So. 3d 734 (Miss. 2020)**
https://courts.ms.gov/Images/Opinions/CO147236.pdf

Issue Comment on Post-Arrest Pre-Mirada Silence

Jones was convicted of aggravated assault. After Jones discovered that the police were searching for him, he went to the police station. Jones did not give a statement; but he did deny shooting anyone. The State first questioned about Jones's pre-Miranda silence. There was a sustained objection with no mistrial requested – issue not preserved.

Next the State cross-examined Jones about his pre-Miranda silence.

The Court found that it does not violate due process of law for the State to cross-examine as to post-arrest pre-Miranda silence when a defendant chooses to take the stand if done for impeachment purposes.

Impeachment / Substantive Evidence

***Thames v. State*, 310 So. 3d 1163 (Miss. 2021)**
https://courts.ms.gov/Images/Opinions/CO151476.pdf

Issue: Hostile witness impeachment as substantive evidence

Thames' conviction of being an accessory after the fact to murder was based entirely on the testimony of co-defendant Richard Lofton by way of the State impeaching him with prior unsworn out-of-court statements to law enforcement agents and with his sworn guilty plea testimony and prior sworn testimony in the trial of another co-defendant.

Lofton crawfished and denied all the facts to which he had previously testified which included facts incriminating Thames. Lofton admitted that he had testified at his guilty-plea and co-defendant's trial saying both times that Thames had given him and the others the "green light to go shoot up Grass's house."

There were no trial objections. The Court ruled that any issue to the unsworn statements was waived and there was no plain error in the use of the sworn statements. The inconsistency requirement of Rule 801(d)(1)(A) was met, as were the foundational requirements under Rule 613.

***Phillips v. State*, 303 So. 3d 76 (Miss. Ct. App. 2020)**
https://courts.ms.gov/Images/Opinions/CO144311.pdf

Issue: Impeachment with prior testimony.

A was lady robbed in her driveway by masked man. Phillips was charged. His first trial ended in a hung jury because victim could not identify Phillips. However, after the victim left the witness stand, she advised prosecutors that she recognized Phillips by his eyes. Before the retrial, the DA advised the defense that the lady was going to identify Phillips. A motion in limine followed with the court ruling that the victim could testify and be cross-examined her wither prior inconsistent testimony.

At the second trial, the state did not question the victim on the "out of court" identification on direct; but after cross examination, on redirect the state did address it.

No error, the out-of-court ID was not suggestive, and the defense opened the door to the out of court ID anyway.

***Augustine v. State*, No. 2019-KA-01467-COA, 2020 WL 7350676 (12/15/20)**
Cert. Petition Pending
https://courts.ms.gov/Images/Opinions/CO150749.pdf

Issue: Hearsay and impeachment prior unsworn statement

Augustine was convicted of second-degree murder – police had an incrimination statement from a witness who testified but denied making any statement. An investigating officer impeached the witness by testifying that a statement was given. But the officer's testimony included his recall of the contents of the statement which the COA found to be incompetent prejudicial hearsay which was not cured by the trial court's Rule 105 limiting instruction. There was no

substantive testimony to be impeached and no reason to introduce the officer's testimony regarding the content of the conversation.

The Court found that the additional hearsay exceeded the original scope of the witness' statement with non-impeaching substantive evidence which prejudiced Augustine. Prior unsworn inconsistent statements, as a rule, are allowed to be used at trial only as impeachment evidence, not as substantive evidence. The trial court erred in allowing the testimony under the guise of impeachment. Reversed and remanded for a new trial.

Discovery Violation

***Jones v. State*, 307 So. 3d 486 (Miss. Ct. App. 2020)**
https://courts.ms.gov/Images/Opinions/CO146222.pdf
Issue: Duty to reveal new charges against co-defendant

Jones and two other men charged with armed robbery – one rolled over leaving two. Before trial, Jones' remaining co-defendant was indicted for witness-tampering – threatening Jones and the other co-defendant. This was not disclosed, and Jones raised a Brady v Maryland violation.

The Court found that Jones failed to demonstrate that a reasonable probability existed that the outcome of his trial would have been different if the State had provided the co-defendant's indictment during discovery - one of the Brady requirements.

***Blakely v. State*, 311 So. 3d 593 (Miss. Ct. App. 2020)**
https://courts.ms.gov/Images/Opinions/CO145743.pdf
Attorney did not disclose defense witness learned of the day before trial. The Court agreed with the trial court that counsel was negligent in not finding the witness – failure to investigate - and that the trial court was justified finding that the discovery violation warranted exclusion of the undisclosed witness.

Jury Instructions

***Cruz v. State*, 305 So. 3d 149 (Miss. Ct. App. 2020)**
https://courts.ms.gov/Images/Opinions/CO144362.pdf

Issue: Denial of manslaughter instruction

Cruz was convicted of first-degree murder of her boyfriend, Larry Phillips, by running over him in her truck. Cruz confessed that she intentionally ran over Phillips following an argument earlier in the evening.

Cruz then gave a written statement that after drinking in a bar, Phillips became jealous of other men in the bar. They left with Cruz driving and argued more. Phillips got out of the truck and Cruz returned to the bar then left again. Seeing Phillips walking down the highway, she ran over him. Cruz stated that she was "afraid" of Phillips because he had previously talked about killing people and dealing drugs and had sent her an angry text message.

The Court found that Cruz's requested manslaughter Instruction was properly refused.

***Washington v. State*, 298 So. 3d 430 (Miss. Ct. App. 2020)**
https://courts.ms.gov/Images/Opinions/CO145947.pdf

Issue: Instruction on elements of aggravated assault and burglary-

1. Washington argued that the jury was instructed to find him guilty of aggravated assault if he attempted to cause "bodily injury" to the victim, not "serious bodily injury" as required under section 97-3-7(2)(a). The State conceded this point and the Court agreed with the parties that the instruction was inadequate and reversed Washington's conviction for aggravated assault with remand for a new trial.

2. The elements instruction for burglary omitted reference to the crime intended inside, it just said "with the felonious intent of him to commit a crime therein, and once therein the said Victor Washington, did take, steal and carry away … the personal property of Kathryn Hoggatt." The Court found that the requirements of Rule 7.06 were met.

***McNeer v. State,* 307 So. 3d 508 (Miss. Ct. App. 2020)**
https://courts.ms.gov/Images/Opinions/CO150265.pdf

Issue: Jury Instruction on no duty to retreat / castle doctrine.

McNeer was convicted of second-degree murder.

There was a verbal confrontation between McNeer and the victim who was sitting in a chair on McNeer's porch. The evidence conflicted, but there was testimony that the victim showed an "overwhelming amount of anger" that was "very, very scary" to the witness. The victim was staring at McNeer with an "evil look." McNeer said the victim "stared at me so hard" with what appeared to McNeer an intent to "kill or hurt" which scared McNeer. McNeer pulled a handgun and the next thing he knew, the victim "[came] up out of that chair [and] leaned towards [McNeer]. . . like almost a football tackle."

It was undisputed that the victim jumped up from his chair before he was shot which to the Court indicated that he was jumping up to leave or he was jumping up to attack McNeer.

The COA found that the trial judge erred reversibly by unilaterally deciding that McNeer was the initial aggressor as a result of pulling a gun and refusing jury instructions for no duty to retreat and the castle doctrine. Reversed with remand for a new trial.

***Jennings v. State*, 311 So. 3d 712 (Miss. Ct. App. 2021)**
https://courts.ms.gov/Images/Opinions/CO151365.pdf

Issue: Essential element in jury instruction for sale of controlled substance

The State's elements instruction omitted the statutory element that Jennings must have "knowingly or intentionally" sold methamphetamine. Jennings did not object to this instruction.

The Court found recognized that "instructing the jury on every element of the charged crime is so basic to our system of justice that it should be enforced by reversal in every case where inadequate instructions are given, regardless of a failure to object at trial." Reversed for new trial.

***Kivinen v. State*, No. 2019-KA-01416-COA, 2021 WL 1187004 (3/20/21)**
https://courts.ms.gov/Images/Opinions/CO151651.pdf

Aggravated assault conviction resulting from a bar fight that included alleged use of a baseball bat. The elemental instruction omitted the word "serious" from the phrase "serious bodily injury." Also omitted from the jury instruction was the essential element, "knowingly or recklessly under the circumstances manifesting extreme indifference to the value of human life." Reversed for a new trial.

Revocation of PRS

***Williams v. State*, 298 So. 3d 416 (Miss. Ct. App. 2020)**
https://courts.ms.gov/Images/Opinions/CO143727.pdf

Williams was on probation when arrested for possession of a firearm and other alleged crimes. He was indicted on the gun charge, and the State sought probation revocation which was granted.

Williams appealed, arguing that, because the charge that was the basis for his revocation was later dismissed by nolle prosequi, the revocation was improper.

No error: the trial court had before it during the revocation hearing more than a mere arrest of the probationer. Williams' indictment for possession of a firearm by a convicted felon was compounded with allegations by the State that he had also fled from arrest, committed aggravated assault, and failed to pay the required supervision fees and court costs.

The trial court found this met the preponderance of the evidence standard to revoke, and the fact that the indictment was later nolle prossed does not require the automatic reversal of that decision.

***Knight v. State*, 301 So. 3d 50 (Miss. Ct. App. 2020)**
https://courts.ms.gov/Images/Opinions/CO144487.pdf

Issue: Proper sentencing for first technical violation

Knight was on PRS and was arrested for multiple violations which he admitted. Based on Knight's admissions, the trial court revoked his PRS and placed him in

the custody of MDOC for ten (10) years. Because Knight was only guilty of technical violations, and that this was his first revocation hearing, he was improperly sentenced for those technical violations.

Under section 47-7-37(5)(a) (Supp. 2019) with the 2018 revisions, the number of individual technical violations does not determine the length or where the imprisonment will be served. Rather, with the 2018 revisions, the length and manner of imprisonment for technical violations depends instead upon whether or not this is the defendant's first revocation verses the second, third or fourth. Meaning, multiple technical violations which lead to the first revocation equate to a period of imprisonment "to be served in either a technical violation center or a restitution center not to exceed ninety (90) days."

***White v. State*, 311 So. 3d 1278 (Miss. Ct. App. 2021)**
https://courts.ms.gov/Images/Opinions/CO152171.pdf

Issue: Revocation of PRS – Based on the testimony of White's probation officer, White was homeless, without transportation or phone and unable to report. The trial court found that White absconded also.

The record does not explain why White's homelessness completely prevented him from reporting, and the trial court did not inquire regarding that issue.

The Court ruled, as with the inability to pay fines or restitution, a court cannot revoke an offender's PRS or probation simply because, through no fault of his own, he is unable to report. Also, the trial court erred in finding that White absconded. Such a revocation violates due process. The revocation was vacated.

Electronic Evidence

***Falcon v. State*, 311 So. 3d 1186 (Miss. Ct. App. 2020)**
https://courts.ms.gov/Images/Opinions/CO147616.pdf

Issue: Facebook messages regarding sale of methamphetamine

CI sent message to Falcon wanting to buy dope, Falcon responded but not directly to the CI's request for "a ball." Instead, Falcon invited Baker over to see his new

speakers. The CI arrived at Falcon's house, and Falcon sold him an eight-ball—promptly and without further discussion—and showed him some new speakers.

The court found that Falcon responded to Baker's arrival "in such a way as to indicate circumstantially that he was in fact the" same person who had exchanged Facebook messages with Baker just twenty minutes earlier. This was sufficient evidence for the jury to find that Falcon sent the messages.

Rule 901 does not require conclusive or ideal proof to establish a foundation for electronic evidence. The State was not required to "rule out the possibility" that "someone other than" Falcon sent the messages. The State's burden was to produce evidence sufficient for a reasonable juror to find that Falcon sent the messages. Whether Falcon sent the messages was a factual issue for the jury—not the trial court or this Court—to decide.

***Willis v. State*, 309 So. 3d 1125 (Miss. Ct. App. 2020)**
https://courts.ms.gov/Images/Opinions/CO149744.pdf

Cell phone in prison – messages and photos were forensically dumped from a phone found in Willis' cell.

The data extracted from the cell phone used to convict Willis was not taken from an internet-based application such as Facebook; the data came from the cell phone's hardware (i.e., the memory chip inside the cell phone itself). Therefore, authentication did not require additional connecting information such as is the case with social media.

Counsel of Choice

***Ball v. State*, No. 2019-KA-01289-COA, 2020 WL 7224281 (12/8/20)**
(Motion for Rehearing Pending)
https://courts.ms.gov/Images/Opinions/CO150256.pdf

Issue: Counsel of choice

Two co-defendants Ball and Crocket initially had the same lawyer. Crocket implicated Ball. The State filed a motion to disqualify the lawyer since they wanted to call Crocket at Ball's trial. Ball signed a waiver of conflict.

After concluding that an actual conflict existed and that Ball's waiver was voluntary and knowing, the trial court then considered 1. whether the conflict imperiled the prospect of a fair trial; 2. whether the prosecution was in its early stages; 3. whether there was a violation of an applicable rule of professional conduct; 4. whether the representation would appear unfair or improper; 5. whether there were available means for mitigating the conflict; and 6. whether the State manufactured the conflict. After considering these the trial court declined to accept Ball's waiver and entered an order disqualifying the lawyer as defense counsel for Ball.

Ruling: Even when a conflict is waivable, trial courts "must be allowed substantial latitude in refusing waivers of conflicts of interest." Trial court have an independent interest in ensuring that criminal trials are conducted within ethical standards and appear fair. It is incumbent upon courts to take the necessary steps to ascertain whether conflict warrants separate counsel. Here the trial court found the conflict significant, it was realized early, it violated rule of professional conduct 1.7 and was not cured by the waiver because attorney would have to cross-examine his own client. There was no way to mitigate the conflict and the state did not manufacture the conflict. Removal of counsel deemed appropriate.

***Copes v. State*, No. 2019-KA-00302-COA, 2021 WL 344821 (2/2/21)**
(Motion for Rehearing Pending)
https://courts.ms.gov/Images/Opinions/CO151704.pdf

Pro hac vice lawyer was hired as lead counsel with hired local co-counsel. The pro hac lawyer continuously challenged or ignored evidentiary rulings pre-trial and during trial - there were warnings. When the warnings were not headed, the trial court removed the pro hac lawyer mid-trial requiring co-counsel to finish. The argument on appeal was a violation of counsel of choice rights and that there

were other, less punitive, options to punish pro hac counsel short of removing him.

COA said that the trial court did not err as all courts possess the inherent authority to control the proceedings before them including the conduct of the participants.

The pro hac lawyer was allowed to remain at counsel table and was not totally removed from representation. No error.

Self-representation

***Fogleman v. State*, 311 So. 3d 1221 (Miss. Ct. App. 2021)**
https://courts.ms.gov/Images/Opinions/CO151185.pdf

Fogleman was allowed to self-represent with hybrid counsel. Repeated infractions of the trial court's rulings and decorum resulted in Fogleman's right to self-represent being revoked. The circuit court did not err in revoking Fogleman's right to self-representation.

***Hillie v. State*, No. 2019-KA-01859-COA, 2021 WL 790800 (3/221)**
https://courts.ms.gov/Images/Opinions/CO151150.pdf

With hybrid representation, the requirements of Mississippi Rule of Criminal Procedure 7.1(c) (Waiver of Right to counsel) do not apply.

Miller resentencing

***Alexander v. State*, No. 2019-KA-01612-COA, 2021 WL 671340 (2/22/21)**
Motion for Rehearing Pending
https://courts.ms.gov/Images/Opinions/CO151190.pdf

Issue*: Miller* resentencing funds for expert (5-4 decision).

Alexander was convicted of capital murder in 1998. He filed a PCR in 2015. Prior to the hearing, Alexander's counsel filed two separate motions requesting funds to hire a mitigation specialist and a psychologist for purposes of investigating potential evidence for the *Miller* hearing. The court denied both motions. The

COA found that it was an abuse of discretion to deny funds for any experts under the circumstances. The Court did not hold that a mitigation investigator or a child psychologist is required in every *Miller* sentencing. But in this case funds should have been authorized by the court to assist in preparation for the *Miller* hearing.

Miller v. Ala. – Ineffective Assistance of Counsel - Mitigation

***Young v. State*, 294 So. 3d 1238 (Miss. Ct. App. 2020)**
https://courts.ms.gov/Images/Opinions/CO144143.pdf

Issue: *Miller* case / ineffective assistance of counsel

As to the fifth *Miller* factor, it was undisputed that evidence of rehabilitation did exist at the time of Young's *Miller* re-sentencing hearing but was not offered into evidence at that hearing. Additionally, defense counsel failed to rebut the prosecutor's express argument that no rehabilitative evidence existed and did not address the possibility of Young's rehabilitation in her closing argument. Young argued on appeal that his attorney failed to present readily available evidence to mitigate the accusation that he is "permanently incorrigible." This evidence consisted of eleven certificates that Young earned in prison that he had attached to his PCR motion.

The Court found there was no conceivable strategy for Young's lawyer to fail to present readily available evidence of Young's capacity for rehabilitation at his *Miller* re-sentencing hearing. These failures had a reasonable probability of affecting the outcome of the case. Reversed.

Capital Case Mitigation

***Andrus v. Texas*, 140 S. Ct. 1875, 207 L. Ed. 2d 335 (2020)**
https://www.supremecourt.gov/opinions/19pdf/18-9674_2dp3.pdf

At a state death penalty habeas hearing, it was shown that Andrus had a very traumatic childhood. During Andrus' capital trial, however, nearly none of the mitigating evidence reached the jury. That is because Andrus' defense counsel not only neglected to present it, he failed even to look for it. Indeed, counsel performed virtually no investigation of the relevant evidence. Those failures also

fettered the defense's capacity to contextualize or counter the State's evidence of Andrus' alleged incidences of past violence. Only years later, during an 8-day evidentiary hearing did the grim facts of Andrus' life history come to light. And when pressed at the hearing to provide his reasons for failing to investigate Andrus' history, Andrus' counsel offered none.

The Court concluded that the record was clear that Andrus demonstrated his counsel's deficient performance under *Strickland* and reversed and remanded.

Walker v. State, 303 So. 3d 720 (Miss. 2020)
Cert. Pet. to SCOTUS Pending
https://courts.ms.gov/Images/Opinions/CO147052.pdf

Issue: Effectiveness of Counsel – Capital Death Penalty

Walker's counsel did minimal investigation. Nevertheless, counsel did have a strategy to humanize Walker and, although counsel did not offer testimony about a difficult childhood and mental problems, evidence was presented that Walker had "a supportive family; a young daughter whom he loved; relatives who loved him; he enjoyed respectable employment and had even risked his own life by rushing into a burning house to save a child.

The Court said, "the circumstances surrounding counsel's deficient performance in *Andrus* are not present here." Counsel's strategy was not unreasonable; he did not disregard evidence without strategic justification and Walker did not meet the burden of proving a different outcome was likely.

***Keller v. State*, 306 So. 3d 706 (Miss. 2020)**
https://courts.ms.gov/Images/Opinions/CO150896.pdf

Issue: Mental Competency - Capital murder/death penalty PCR - Keller argued that his trial counsel was ineffective for failing to investigate and discover significant mitigating evidence. Particularly he said that trial counsel failed to follow through with a psychologist's recommendation for "a mitigation study" regarding Keller's "psychological functioning."

The Court found that counsel did perform some mitigation investigation into Keller's mental status. A competency evaluation and IQ tests were performed, and evidence was presented at trial of Keller's low average IQ. The decision not to explore and offer additional mitigation evidence was trial strategy not amounting to ineffective assistance of counsel.

Additionally, Keller argued that the trial judge erred by conducting factual research beyond what was in the record. In her order, the trial judge cited several articles about drug use by way of footnote. Conducting factual research beyond what was in the record was error. However, the error was harmless.

Fourth Amendment-Search Warrant

***Brown v. State,* No. 2019-KA-01383-COA, 2021 WL 973047 (3/16/21)**
Motion for Rehearing Pending
https://courts.ms.gov/Images%5COpinions%5CCO152374.pdf

Issue: Defective Search Warrant

A warrant for the search of Brown's residence did not list the time of issuance and the name of the officer to whom it was issued as required by Rule 4.3. The warrant was executed the same day.

Because the officer executed the warrant within hours of its issuance, the goal of execution of the warrant within ten days was met. Although the warrant technically violated Rule 4.3, the search and seizure actions by the government in this case were in conformance with the Constitution. The warrant's failure to provide the exact time was harmless error because the warrant was clearly executed within hours of issuance and within the mandated ten-day time frame. The warrant's failure to include the name of the designated officer was harmless error because the record is clear that Officer Ray was the officer who requested and received the warrant. The goals of Rule of 4.3 were met and to hold the search warrant in this case invalid would, without doubt, put form over substance.

First Amendment

***Edwards v. State*, 294 So. 3d 671 (Miss. Ct. App. 2020)**
https://courts.ms.gov/Images/Opinions/CO144512.pdf

Issue: Unconstitutional statute

Edwards posted Facebook videos in which he accused a local pastor of sexual misconduct.

He was convicted under section 97-45-17 which makes it a felony to "post a message for the purpose of causing injury to any person through the use of any medium of communication, including the Internet or a computer, . . . without the victim's consent."

The COA agreed with Edwards's argument that section 97-45-17 is unconstitutionally overbroad in violation of the Free Speech Clause of the First Amendment.

The statute criminalized any communication, whether true or untrue, that is intended to cause "injury to any person." Neither the statute nor the jury instructions define the term "injury."

Section 97-45-17 criminalizes a substantial amount of protected speech, including core political speech. By its terms, the statute also criminalizes protected speech about public figures. Nothing in the statute requires the State to prove that the defendant knowingly or recklessly posted a false message. The statute criminalizes even perfectly truthful speech, and all that must be shown is that the speaker intended to cause some "injury" to the subject.

In a footnote, the COA observed that Edwards was not prosecuted for threatening the pastor, rather just for posting messages for the purpose of causing some undefined "injury."

Late additions – not covered in live presentation.

***Mohamed v. State,* 2019-KA-01273-COA (4/20/21)**
https://courts.ms.gov/Images/Opinions/CO152451.pdf

Mohamed was convicted of selling Khat, a middle eastern plant, legal in many parts of the world, that contains a Schedule 1 controlled substance. This case has issues concerning the relevance of expert testimony about khat and alternate weighing methods and discovery violation issue over the late disclosure of the excluded expert's proposed opinions and topics. No reversible errors.

***Murshid v. State*, NO. 2020-KA-00033-COA (4/20/21)**
https://courts.ms.gov/Images/Opinions/CO153297.pdf

Murshid was convicted of selling spice and counterfeit merchandise. The Court addressed a statute of limitations question, a search and seizure question over whether an employee can give consent to search. No reversible errors.